Supreme Court, U.S.
FILED
JUN 10 2005
OFFICE OF THE CLERK

(3)

No. 04-1372

IN THE

Supreme Court of the United States

SETH E. SICROFF,

Petitioner,

v.

STEPHEN C. JETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DANIEL P. WHALEY
LAW OFFICE OF
DANIEL P. WHALEY
2600 H Street
Sacramento, CA 95816
(916) 447-3800

SETH P. WAXMAN
Counsel of Record
CRAIG GOLDBLATT
DANIELLE SPINELLI
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. JETT'S EFFORT TO MANUFACTURE A "VEHICLE PROBLEM" REQUIRES HIM TO MISCONSTRUE THE RECORD 3

A. The Bankruptcy Court Found That Sicroff Believed His Statements Were True When Made, And That Finding Was Undisturbed On Appeal 3

B. The Record Is Clear That Sicroff's Only "Concession" Was That He Intended To Make The Allegedly Defamatory Statements 4

II. THE NINTH CIRCUIT'S DECISION SPLITS WITH THE FIFTH AND SIXTH CIRCUITS 5

A. The Decision Below Splits With The Fifth Circuit's Decision In *Miller* 6

B. The Decision Below Splits With The Sixth Circuit's Decisions In *Wheeler* And *Kennedy* 7

III. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S DECISION IN *GEIGER* 10

CONCLUSION 10

APPENDIX: Bankruptcy Court hearing excerpts 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Davis v. *Aetna Acceptance Co.*, 293 U.S. 328 (1934) 6
Graver Tank & Manufacturing Co. v. *Linde Air Products*, 336 U.S. 271 (1949) 4
Kawaauhau v. *Geiger*, 523 U.S. 57 (1998) 1, 10
In re Markovitz, 190 F.3d 455 (6th Cir. 1999) 2
Kennedy v. *Mustgaine (In re Kennedy*, 249 F.3d 576 (6th Cir. 2001) 9
Miller v. *J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998) 1, 2, 7, 9, 10
Mills v. *Ellerbee*, 177 B.R. 731 (Bankr. N.D. Ga. 1995) 10
Murray v. *Bammer (In re Bammer)*, 131 F.3d 788 (9th Cir. 1997) 10
Wheeler v. *Laudani*, 783 F.2d 610 (6th Cir. 1986) ... 1, 2, 7, 8, 9

RULES

Fed. R. Evid. 801(c) 4

TREATISES

Restatement (Third) of Torts (proposed final draft 2005) 6

The bankruptcy court in this case made a finding of fact that Petitioner Sicroff believed his statements were true at the time he made them. The basic premise of Respondent Jett's Opposition is that that finding of fact is erroneous. But the district court rejected that claim. And even Jett acknowledges that this finding was never mentioned—let alone reversed—by the Ninth Circuit. Opp. 16. So, as the case reaches this Court, it presents the question whether a debt for libel can be for "willful and malicious" injury when the debtor believed the statements to be true when made. Jett cannot now manufacture a "vehicle problem" by challenging factual findings that were undisturbed on appeal.

The petition explained that the Ninth Circuit's decision below openly splits with the Fifth Circuit's decision in *Miller* v. *J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998), which held that a debt is not for "willful and malicious" injury under Section 523(a)(6) of the Bankruptcy Code unless the debtor intended to inflict a legally cognizable injury on the plaintiff. Pet. 8-11. The petition further explained that the decision also splits with the Sixth Circuit's decision in *Wheeler* v. *Laudani*, 783 F.3d 610 (6th Cir. 1986), which held that a debt for libel is not one for "willful and malicious" injury if the debtor believed that the statements were true when made. Pet. 11-13.

The Opposition acknowledges (at 19-20) these analytic differences between the Ninth Circuit's approach to this issue and those adopted by the Fifth and Sixth Circuits. Jett's argument that this case is not a proper vehicle for resolving this conflict is premised on his attack on the bankruptcy court's undisturbed findings of fact. And his argument that this case would come out the same way under the law of the Fifth or Sixth Circuits is another variant on the same theme. In truth, there is no disputing that the outcome of this case would be different under the construction of Section 523(a)(6) adopted in the Fifth and Sixth Circuits.

Kawaauhau v. *Geiger*, 523 U.S. 57 (1998), holds that, under Section 523(a)(6), the *injury* must be intentional, not just the act that causes the injury. But in many cases a debtor will take an action knowing that it may cause "harm,"

but believing that the action is nevertheless justified, and therefore not intending to cause any *legally cognizable* injury. In a libel case, for example, the debtor may make a statement knowing it may injure the plaintiff's reputation, but believing the statement to be true. Or in a case of battery, the debtor may intend to cause physical injury to another, believing genuinely (even if unreasonably) that the actions were necessary acts of self-defense. As the petition demonstrated, the circuits have divided on the question whether Section 523(a)(6) encompasses such conduct.

The Fifth Circuit has held that it does not. That court, treating the willful and malicious prongs as a "unitary inquiry," has held that, in order for a debt to be for either "willful" *or* "malicious" injury, the debtor must have intended to cause *legally cognizable* injury. *Miller*, 156 F.3d at 606 ("the debtor must have been aware that its act violated the legal rights of the creditor"). Under the *Miller* court's analysis, the debtor who intentionally inflicts harm in the "honest, but mistaken" belief that the harm was justified has not committed a "willful and malicious" injury. *Id.*

The Sixth Circuit gets to the same result, though perhaps by a different route. While Jett may be correct that the Sixth Circuit (like the Ninth) rejects the Fifth Circuit's "unitary inquiry," *see* Opp. 19; *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999), that court treats the question whether the defendant believed his actions were justified as part of the "malice" prong. *See Wheeler*, 783 F.2d at 615 ("'[m]alicious' means . . . without just cause or excuse"). And the Sixth Circuit has clearly held that a debt for libel is for "willful and malicious injury" only "when the debtor/author knows the published statements were false." *Id.* "Mere reckless disregard for the truth or falsity of the statement" is insufficient. *Id.*

Under the reasoning of the Ninth Circuit below, however, a debtor's belief that his actions were justified does not render the debt dischargeable, so long as the statements were in fact false, and he intended to cause "harm." Pet. App. 10a (finding "malice" because "Sicroff went well beyond the scope of his legitimate goal to attack Jett by

name"). That approach—which the Ninth Circuit openly acknowledged splits with the Fifth Circuit, *id.* at 10a n.4 (stating that *Miller* "conflates the elements of willfulness and malice in contravention of our clear precedents")—is outcome-determinative here.

More fundamentally, the Ninth Circuit's holding that a debt can be nondischargeable even where a debtor was merely negligent or reckless as to the presence of a "justification" for causing the harm (such as the truth of the statement) cannot be squared with *Geiger*, which makes plain that only debt for *intentional* injury is nondischargeable.

The split in authority is square, acknowledged, and properly presented. Not even Jett suggests that the conflict will disappear of its own accord absent this Court's intervention. The Court should grant certiorari to resolve it.

I. JETT'S EFFORT TO MANUFACTURE A "VEHICLE PROBLEM" REQUIRES HIM TO MISCONSTRUE THE RECORD

A. The Bankruptcy Court Found That Sicroff Believed His Statements Were True When Made, And That Finding Was Undisturbed On Appeal

The bankruptcy court squarely and properly rejected the underlying premise of Jett's Opposition—"that Sicroff knew that certain of his libelous statements were false when made" and "the record is barren of any statement by Sicroff or any admissible evidence that Sicroff believed that his libelous statements were true when he made them." Opp. i. The bankruptcy court, as the finder of fact, reached exactly the opposite conclusion: "While there can be no doubt that Debtor intentionally and repeatedly published his untrue statements about Plaintiff, the evidence tends to show that he believed those statements were true and, in his opinion, explained the real cause for the proposal to close the Geography Department." Pet. App. 26a-27a.

That factual finding was not disturbed by either the district court or the Ninth Circuit. The district court flatly rejected the claim Jett repeatedly invokes: "[T]he record does not demonstrate that [Sicroff] believed or knew that his statements were false. In all the evidence presented by appellant to the bankruptcy court, there is none, circumstantial

or otherwise, that tends to establish what the debtor must have actually known when taking the injury-producing action. [Jett's] evidence . . . does not suggest that Sicroff did not believe his statements were true." Pet. App. 21a.

The Ninth Circuit never even mentioned—let alone reversed—this specific factual finding made by the bankruptcy court. Jett is thus left to engage in his own *de novo* review of the bankruptcy court's findings, from which he concludes that "there is no admissible evidence that Sicroff believed his statements were true when he made them." Opp. 16. But the bankruptcy court, which actually heard the evidence, concluded otherwise. Jett's challenge to these findings is thus barred by the long-accepted "two-court rule," under which findings of fact left undisturbed on appeal are not subject to reconsideration in this Court absent "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prods.*, 336 U.S. 271, 275 (1949).[1]

At bottom, Jett's Opposition does little more than take issue with undisturbed factual findings with which he disagrees. That cannot change the fact that as this case comes to this Court, those findings are taken as true. The case thus presents the question set out in the petition: Is a debt for libel nondischargeable when the debtor believed the libelous statement to be true when it was made?

B. The Record Is Clear That Sicroff's Only "Concession" Was That He Intended To Make The Allegedly Defamatory Statements

Jett also contends that certiorari should be denied here because Sicroff conceded below that the "willful" prong was satisfied. Opp. 5 & n.3. That is not true. In fact, the context makes unmistakably clear that Sicroff's counsel was acknowledging only that the statements were intentionally

---

[1] Jett's argument that the bankruptcy court improperly relied on hearsay evidence—a letter Sicroff wrote to the editor of a college newspaper that pointed to other documentary evidence—to support its conclusion that Jett believed his statements were true (Opp. 4 & n.2, 7, 16) is wide of the mark. The bankruptcy court did not credit the evidence for the truth of its assertion, but only as evidence of Sicroff's subjective state of mind. *See* Fed. R. Evid. 801(c) (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted").

made.[2] Accordingly, there can be no serious argument that any "concession" provides a reason for denying the petition.[3] In any event, even if Sicroff had conceded that the "willful" prong was satisfied (which he did not), that would not make this case any less certworthy, since the Ninth Circuit splits with both the Fifth and the Sixth Circuit as to its treatment of the "malicious" prong—and since its approach clearly results in a different outcome.

II. THE NINTH CIRCUIT'S DECISION SPLITS WITH THE FIFTH AND SIXTH CIRCUITS

Jett focuses his Opposition on whether the Section 523(a)(6) requirements that the injury be "willful" and "malicious" to be nondischargeable should be understood as a "unitary concept," as the Fifth Circuit said in *Miller*, or as separate requirements, as the Ninth Circuit held here. Opp. 19. He contends that nothing in *Geiger* precludes courts from examining the "willful" and "malicious" elements separately, so long as "debts for unintentional injuries are not held to be nondischargeable." Opp. 14.

That is true as far as it goes, but fails to appreciate the substantive difference that the Ninth Circuit's approach makes in cases in which the debtor was merely negligent—not with respect to the act that caused the injury, but rather as to the presence or absence of a "justification" for committing that act. This issue arises not only in actions for libel where the debtor believed his statements were true, but also, for example, in actions for battery where the debtor mistakenly believed his actions were justified by self-

---

[2] For the Court's convenience, the relevant passages of the nondischargeability hearing are reproduced in full in the Appendix to this Reply Brief. *See, e.g.*, App. 1a ("And the Court looks at it — it's obviously willful. I mean, *it's an intentional act.* It's 'willful and malicious' that has to exist to avoid dischargeability.") (emphasis added); App. 3a ("In fact, Mr. Whaley has acknowledged that they were intentional acts.").

[3] Nor is there merit to Jett's contention that certiorari should be denied because Sicroff did not travel from Nepal for, or present evidence at, the nondischargeability hearing. Opp. 2-3. Sicroff was represented at that hearing by counsel who argued, correctly and successfully, that the dischargeability of the debt was plain from the very evidence on which Jett was relying. App. 1a-2a, 7a.

defense, *see* Restatement (Third) of Torts § 33 cmt. e (2005) (noting that "in some cases an intentional tort is not highly culpable, as when an actor commits a battery, subjectively, but unreasonably, believing it to be justified by self defense"), or actions for conversion where the debtor believed, incorrectly, that he was authorized to take the property. [4]

The Ninth Circuit's reasoning is that in cases like these, so long as the debtor (a) intended to cause "harm" and (b) was wrong in believing that the harm was legally justifiable, there is no "just cause and excuse" for the debtor's actions and the debt is nondischargeable. Pet. App. 10a ("Not only were his libelous statements legally wrongful, but Sicroff went well beyond the scope of his legitimate goal to attack Jett by name.") The Fifth Circuit's "unitary inquiry," asking whether the debtor intended to cause a *legally cognizable* injury, leads to the opposite conclusion.[5] Alternatively, one could conduct "separate" inquiries as the Sixth Circuit did in *Wheeler*, such that "just cause and excuse" is part of the "malicious" prong. But in that case, the reasoning of *Geiger* requires (as the *Wheeler* decision does, but the decision below does not) that the debtor have knowledge that he is acting without "just cause or excuse." It cannot be enough that the debtor's belief that such "just cause and excuse" existed turned out to be incorrect. This disagreement on the meaning of Section 523(a)(6) can only be resolved by this Court.

A. The Decision Below Splits With The Fifth Circuit's Decision In *Miller*

Jett does not dispute the existence of a split between the decision below and the Fifth Circuit's decision in *Miller*. Instead, he argues only that the conflict "does not warrant certiorari review of the instant case." Opp. 19. But Jett's

---

[4] *See Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934) (addressing, in action seeking a determination that a debt for conversion was nondischargeable, circumstance in which the debtor holds "an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed").

[5] As noted in the Petition (at 10 n.5), the Fifth Circuit has held that where there is "objective substantial certainty" of legally cognizable injury, such intent can be inferred.

argument to this effect is just a reprise of his attacks on the bankruptcy court's undisturbed findings of fact, contending that "on the record submitted to the Ninth Circuit in this case," the *Miller* reasoning would lead to the same result. That is wrong. *Miller* clearly reads *Geiger* to require that in order for an injury to be "willful" or "malicious," the debtor must have had an "actual intent to cause injury," 156 F.3d at 603, meaning a "legally cognizable injury," *id.* at 606. *See also id.* (describing its test as "quite close" to one proposed by commentators under which the debtor "must have been aware that its act violated the legal rights of the creditor").

Accordingly, in the Fifth Circuit, a debtor who acted with an intent to cause harm, but under the belief that such actions would not inflict a "legally cognizable injury" because the actions were justified (such as by making a statement that would tend to injure reputation, but that the debtor believed to be true), would not have inflicted a "willful and malicious" injury. By contrast, in the Ninth Circuit, a belief that the statements were true is not sufficient to render the debt dischargeable. Because the bankruptcy court's finding that Sicroff believed his statements to be true was not disturbed on appeal, and because—as Jett does not dispute (Opp. 16-17)—California law requires no more than a showing of negligence as to the truth or falsity of the statement to support a libel verdict, the split between the Fifth and Ninth Circuits is squarely presented here.

B. The Decision Below Splits With The Sixth Circuit's Decisions In *Wheeler* And *Kennedy*

Jett also recognizes the tension between the decision below and the Sixth Circuit's decision in *Wheeler*, 783 F.2d at 615, which held that "[t]he intentional tort of libel meets the requirements of § 523(a)(6) for nondischargeability when the debtor/author knows the published statements were false." Opp. 21. None of Jett's efforts to reconcile that statement with the decision below resolves the plain conflict.

First, Jett quibbles with the petition's characterization of *Wheeler* (Opp. 21-22), pointing out that the judgment of the Sixth Circuit was not an outright reversal of the determination that the debt was nondischargeable, but rather a

remand for factual findings on whether the debtor "knew the published statements were false." That remand only highlights the conflict between *Wheeler* and the decision below. As much as Jett seeks to disregard the undisturbed finding of fact that Sicroff believed his statements were true when he made them, even he cannot glean from his own *de novo* review of the record any type of "finding"—required under *Wheeler*—that Sicroff knew his statements were false.

Second, Jett argues that the Sixth Circuit's statement that a claim for libel is nondischargeable if the debtor knew the statements were false does not mean that this is the only circumstance in which the debt is nondischargeable. "It is simply wrong as a matter of law and logic to equate a statement concerning a circumstance that satisfies the requirements of section 523(a)(6) with a holding that the requirements of section 523(a)(6) are met ***only*** when such circumstance is present." Opp. 22 (double emphasis in original).

But even if the Sixth Circuit's language was ambiguous in this regard—and in context, the negative inference there is as clear as it is in the statement: "you may go when the light turns green"—any such ambiguity was clarified by the very next sentences of the opinion, which state:

> Mere reckless disregard for the truth or falsity of the statement, which can support a libel verdict, is not a willful and malicious injury for purposes of § 523(a)(6). Laudani contends that a genuine issue of material fact exists as to whether . . . Laudani recklessly disregarded the truth or . . . he knew his statements were false; *only the latter would prevent discharge of the debt.*

783 F.2d at 615 (emphasis added and citations omitted). Contrary to Jett's efforts to distort the holding of *Wheeler*, that case clearly held that a debt for libel is nondischargeable *only* when the debtor knew his statement to be false.

Finally, Jett's effort to reconcile *Wheeler* with the decision below falls back on his refrain that, notwithstanding the undisturbed finding of fact, the record does not support the conclusion that Sicroff believed his statements were true. But again, Jett cannot manufacture a "vehicle problem" by taking issue with the bankruptcy court's factual findings.

As for the Sixth Circuit's decision in *Kennedy* v. *Mustaine (In re Kennedy)*, 249 F.3d 576 (6th Cir. 2001), that case involved a circumstance where (unlike here) the debtor knew his statements were false when made. *See id.* at 581 (quoting the district court as noting that "the Kennedys continued to make the statements in question even after receiving clear proof that the statements were false"); *id.* at 582-583 ("Debtors continued to make the statements ... even after they became aware [of their falsity]"). *Kennedy* is therefore fully in accord with *Wheeler*, making clear that the Sixth Circuit rule remains the one announced in *Wheeler*: "The intentional tort of libel meets the requirements of § 523(a)(6) for non-dischargeability when the debtor/author knows the published statements were false." 783 F.2d at 615. And on the findings below as they come to this Court, the decision below is in open conflict with that rule.

* * * * *

When the underbrush is cleared away, there is a sharp division in the circuits on the question whether, under this Court's decision in *Geiger*, a debt is for "willful and malicious injury" when the debtor intentionally caused harm, but did so in the belief that the harm was legally justifiable. The Fifth Circuit has held that such conduct by an "honest but mistaken" debtor does *not* constitute "willful and malicious" injury; rather, the "willful and malicious" test is met only where the debtor intended to cause "legally cognizable injury." *Miller*, 156 F.3d at 606. The Sixth Circuit effectively gets to the same result by treating, as "just cause and excuse" under the "malicious" prong, the debtor's belief that his conduct was legally justifiable (in a libel case, the debtor's *belief* that his statement was true), even if that belief was in error. *Wheeler*, 783 F.2d at 615. The Ninth Circuit, in the decision below, breaks with these cases, treating "just cause and excuse" as applying only when the debtor's statement was in fact true, and not when the debtor harbored an honest but mistaken belief in its truth.[6]

---

[6] In addition to the decisions of the Fifth and Sixth Circuits, the petition identifies a number of district and bankruptcy court decisions that

III. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S DECISION IN *GEIGER*

Certiorari is also appropriate because the decision below conflicts with *Geiger*.[7] This Court could not have been clearer: "[N]on-dischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." 523 U.S. at 61 (emphasis in original). But the Ninth Circuit said just the opposite: "[I]t is the wrongful act that must be committed intentionally rather than the injury itself." Pet. App. 8a-9a. And in support of that proposition, the Ninth Circuit expressly relied on a decision that preceded *Geiger* and stated the very rule that *Geiger* rejected. *See Murray* v. *Bammer* (*In re Bammer*), 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part definition does not require a showing of . . . an intent to injure, but rather it requires only an intentional act which causes injury."). Were it not for the substantial confusion in the lower courts over the contours of the *Geiger* principle, this plain disregard for Supreme Court authority might otherwise justify the summary reversal of the decision below. At the very least, it counsels strongly in favor of granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

have held that one who publishes a false statement without knowledge of its falsity cannot have committed a willful and malicious injury. *See* Pet. 13 n.7. Respondent also points to a lower court opinion, *Mills* v. *Ellerbee*, 177 B.R. 731, 742 (Bankr. N.D. Ga. 1995), that has lined up on the other side of this circuit conflict. Opp. 17. Accordingly, certiorari is appropriate here not merely to correct the Ninth Circuit's decision below, but more broadly to resolve an issue that has divided the lower federal courts.

[7] Jett correctly points out that the appendix to the petition inadvertently omitted a footnote in the Ninth Circuit's decision that appears in the reported decision as amended on April 11, 2005, but that was not contained in the original opinion as filed on March 23, 2005. Opp. 5 n.4. In that footnote, the Ninth Circuit concluded that because the willfulness prong was "conceded," see *supra* p. 3 & n.2, the *Geiger* analysis did not apply. In addition to being wrong, that conclusion further conflicts with the Fifth Circuit's *Miller* decision, 156 F.3d at 605 (holding that *Geiger* "displaced" circuit precedent on the meaning of "malicious").

Respectfully submitted,

DANIEL P. WHALEY
LAW OFFICE OF
DANIEL P. WHALEY
2600 H Street
Sacramento, CA 95816
(916) 447-3800

SETH P. WAXMAN
Counsel of Record
CRAIG GOLDBLATT
DANIELLE SPINELLI
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

JUNE 2005